IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

ALVIN "ALLI" PAUL, Plaintiff/Appellant,	**D.C. CIV. APP. NO. 1999/055**
v.	Re: T.C. CIV. NO. 152/1996 Action for Damages
ELECTRIC AVENUE, KENROY INT'L DISTRIBUTOR, KINGDOM LIGHTING CO., LTD., and UNDERWRITERS LABORATORIES, INC., Defendants/Appellee.	

On Appeal from the Territorial Court of the Virgin Islands

Considered: July 26, 2001
Filed: August 29, 2001

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **BRENDA J. HOLLAR**, Administrative Judge of the Territorial Court, Division of St. Thomas and St. John, Sitting by Designation.

APPEARANCES: **Lee J. Rohn, Esq.**
K. Glenda Cameron, Esq.
St. Croix, U.S. Virgin Islands
Attorneys for Appellant,

Stacy L. White, Esq.
St. Croix, U.S. Virgin Islands
Attorney for Appellee Kenroy Int'l Distrib.

OPINION OF THE COURT

PER CURIAM.

This appellate Court is called upon to determine whether summary judgment was properly granted in favor of Kenroy

International Distributor ("Kenroy" or "Ken Roy"). For the reasons stated herein, summary judgment will be affirmed.

I. FACTS

In September 1995, Alvin Paul ("Paul") purchased four (4) halogen "torchiere" lamps from Electric Avenue, located in Barren Spot Mall, Christiansted, St. Croix.[1] Paul and his fiancé, Maria Heywood ("Heywood"), assembled the lamps, and Paul placed the lamp in question in his bedroom.

Paul alleges that on November 29, 1995, the lamp in his bedroom "overheated catching [his] bedclothes on fire and burning [his] right foot." (Amended Appendix of Appellant ("Amend. App.") [Complaint] at 11.) The only identifying label on the lamp read: Underwriters Laboratories Inc., Portable Lamp, ISSUEBD 99242. Paul further alleges that in January 1996, more than a month after the fire, he and Heywood returned to Electric Avenue to gather information from the halogen torchiere lamp boxes in the store. On February 27, 1996, Paul brought suit in the Territorial Court alleging, *inter alia*, that "Ken Roy International Distributor" had

[1] (Responses to Defendant, Ken Roy International, First Set of Interrogatories Propounded to Plaintiff [Response to Interrogatory No. 10] at 11).

distributed the lamp. (*Id.* at 10.)[2]

Kenroy filed a motion for summary judgment on February 24, 1998, alleging that Kenroy did not distribute the subject lamp. The order denying summary judgment was entered on October 28, 1998, and Kenroy filed a motion to reconsider on November 12, 1998.[3] On March 1, 1999, the trial court granted Kenroy's Motion to Reconsider and vacated its October 28, 1998 Order denying Kenroy's summary judgment motion. Paul timely filed this appeal.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction to review the judgments and orders of the Territorial Court in all civil cases pursuant to V.I. CODE ANN. tit. 4, § 33 (1997 & Supp. 2000); Section 23A of the Revised Organic Act of 1954.[4]

This Court exercises plenary review over the order granting

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[2] The Complaint was subsequently amended to allege that the lamp had been distributed by "Ken Roy International Distributor and/or Kingdom Lighting Co., Ltd." Paul subsequently learned that Kingdom Lighting Co. had ceased its business and moved out of its last known location. Attempts to locate its new address were unsuccessful. (Amend. App. at 34.)

[3] November 11 was the Veterans Day holiday, therefore, Kenroy's motion to reconsider filed on November 12, 1998 was timely.

[4] The Revised Organic Act of 1954 is found at 48 U.S.C. § 1613a (1994), *reprinted in* V.I. CODE ANN., Organic Acts, 73-177 (codified as amended) (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"].

summary judgment, and must "apply the same test that the lower court should have utilized." *Carty v. HOVIC*, 42 V.I. 125, 78 F. Supp. 2d 417 (D.V.I. App. Div. 1999); *Tree of Life Distributing Co. v. National Enterprises of St. Croix, Inc.*, 1998 U.S. Dist. LEXIS 17980, at *6, Civ. No. 1997-30 (D.V.I. App. Div. Nov. 5, 1998). While we exercise plenary review over the order granting summary judgment, we must review the order granting reconsideration on an abuse of discretion basis. *See Kralik v. Durbin*, 130 F.3d 76, 80 (3d Cir. 1997).

B. Summary Judgment

The common law provides that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998). Under Section 1, "[l]iability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring." *See id.* cmt. e.

Kenroy sought summary judgment on grounds that it did not distribute the lamp in question. In support of that motion, Kenroy attached a photograph of the lamp bearing an identifying label, and an affidavit from Mr. Rolf Wilck ("Wilck"), the Vice President of

Purchasing for Kenroy. Wilck's sworn statement was that he had personal knowledge of the matter set forth in his affidavit, and that he had

> inspected photographs depicting the subject lamp.
>
> 4. At all times material hereto, Kenroy International did not *design nor manufacture* the lamp indicated in the photographs, based on the fact that the UL number shown is not ours.
>
> 5. Based on a thorough and diligent search of Kenroy International inventory records, at no time did Kenroy *distribute* the subject lamp depicted in the photographs.
>
> 6. This type of lamp is manufactured and distributed by various factories.

(Amend. App. [Affidavit of Rolf Wilck dated October 21, 1996] at 35 (emphasis added).)

Also in the trial record was the deposition testimony of Mr. Ahed Daas ("Daas"), the individual responsible for ordering most of the merchandise for Electric Avenue. On Daas' direct testimony, the following colloquy took place:

> Q Okay. From whom did Electric Avenue first begin ordering torch lamps?
> A. Exactly whom, I really don't know offhand. We buy them from several, you know, distributors, wholesalers.
> Q. All right. I need to know the names of the distributors that Electric Avenue has purchased the torch lamps from.
> A. We buy these from Office Depot, Home Depot, The Fan Shack. That's probably it.
> Q. Was this the case -- has this been the list of distributors since Electric Avenue started business?
> A. Yeah.

Q. Are there any other distributors that Electric Avenue has bought torch lamps from?
A. No.
Q. You said you bought them wholesale as well?
A. We buy them from wholesalers, yeah.
Q. Can you list the wholesalers?
A. These are the same wholesalers.
Q. The same companies?
A. Yeah. . . .

(Supplemental Appendix of Appellee Kenroy International Distributor, Inc. ["Supp. App."] at 5-6.)

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party properly supports its motion for summary judgment, the non-moving party must establish a genuine issue of material fact in order to preclude a grant of summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The evidence and inferences drawn therefrom must be viewed in the light most favorable to the nonmovant. *Id.* at

587; *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366 (3d Cir.1990). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48.

Heywood testified that she and Paul visited Electric Avenue in January 1996 to look at the box to figure out which companies were involved with the halogen lamp. (Amend. App. at 31.) While Paul had delivered the subject lamp to his counsel, he did not give counsel the box that the lamp had been packaged in. Interestingly, Heywood testified that she kept the four empty boxes until July 1996 when they were damaged as a result of flooding caused by Hurricane Bertha. (Supp. App. 8-9.) Despite the lawsuit that had been pending for approximately five months, Heywood testified that she did not take any pictures of the boxes because she "didn't have any need to." (*Id.*)

When asked during a September 13, 1996 deposition to state his basis for believing that Kenroy distributed the lamp, Paul testified:

> After the fire I went back to the store. I looked for the lamp and I saw the box that the lamp came in and on the box has the listing of who the lamp was manufactured by and distributed by and stuff like that.
> Q. Okay. And when you say you saw the box for the lamp, you mean another lamp in the store?
> A. Similar lamp with a picture on the cover. Picture on the box of the lamp that's inside the box.
> Q. Okay. And it looked similar to the ones you had?
> A. It's the same one.

> Q. How do you know it's the same?
> A. Because I can see it.
> . . . .
> Q. Is there any identifying information on the four lamps that you did purchase that indicates who the distributor or manufacturer was of those lamps?
> A. No. I don't think so.
> Q. Have you examined the lamps for that?
> A. Yes.
> Q. You couldn't find any identifying information? Is that no?
> A. No, no sir.
> Q. Other than going to Electric Avenue around the first of this year [1996] to look at a box with a lamp in it, is there any other way that you have identified Kenroy as the manufacturer or distributor of the actual lamp that you had a problem with?
> A. No.

(Amend. App. at 37 (29-30)- 38 (34-35).) In his opposition to Kenroy's motion for summary judgment Paul argued that he had examined the boxes of the four lamps he had purchased, and "observed that they identified the manufacturer as Ken Roy." (Objection to Motion for Summary Judgment at 2.) Paul's opposition also alleged that he visited Electric Avenue in January 1996, and

> found the exact same box for the lamp which was the same as he bought and it was exactly the same as the boxes he previously had bought and examined. He examined the box for the name of the lamp, type, model number and picture of the lamp which was on the box. It identified the manufacturer as Ken Roy International (Deposition, Alli Paul, pp.29-31, Exhibit "1").

(*Id.*) Again, Paul opposed summary judgment on grounds that Kenroy had indeed "manufactured" the lamp in question, but reiterated on appeal that his complaint "only alleged that Kenroy distributed the

lamp." (Brief of Appellant at 7.)

Then, in an affidavit filed on April 14, 1998 (nineteen months after his deposition) as part of his Opposition to Motion for Summary Judgment, Paul stated that

> after one of the three (3) halogen lamps I bought exploded and caused the burning injury to my foot as well as property damage, I looked on the box which the lamp had come in and found Ken Roy International identified as the manufacturer.

(Amend. App. at 19, ¶ 2.) Paul had previously testified during his deposition, that he found the name Kenroy only after going to Electric Avenue in January 1996. Paul argues that because he was not questioned carefully, he misunderstood which boxes the attorneys had been referring to in their questions. (Brief of Appellant at 34.) Paul further argues that his affidavit did not directly or flatly contradict his prior testimony. (*Id.*)

"Where a witness was confused at an earlier deposition or for some other reason misspoke, a subsequent correcting or clarifying deposition or affidavit may be sufficient to create a material dispute of fact." *McKowan, Lowe & Co., Ltd. v. Jasmine, Ltd.*, 127 F. Supp. 2d 516, 530 n.14 (D.N.J. 2000) (citing *Joseph v. Hess Oil*, 867 F.2d 179, 183 (3d Cir. 1989); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3d Cir. 1988)). However, where a non-moving party "filed an affidavit which contradicts earlier deposition testimony, summary judgment has been granted

where the court found that the contradictory affidavit was filed in order to defeat the summary judgment motion." *Martin*, 851 F.2d at 705 (3d Cir. 1988). In this case, the trial judge found that Paul's affidavit "contradict[ed] the testimony given in [Paul's] deposition regarding whether [Paul] saw [Kenroy's] name on the box of the [lamp] he purchased." (Amend. App. at 14.) Therefore, the allegations recited above from paragraph two of Paul's affidavit were not accepted by the trial court.

With this information, the trial judge denied Kenroy's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, despite his finding that Paul's affidavit stating that he saw Kenroy's name on the box of the lamp he purchased, contradicted his deposition testimony. (Amend. App. at 14.) The trial judge found that Paul had, nonetheless, consistently maintained that Kenroy "was listed as the manufacturer of lights of identical make and model." (*Id*. at 14.) As such, the court found that an issue of fact existed regarding the identity of lamp's manufacturer. (*Id*. at 16.)

Kenroy's Motion to Reconsider alleged that summary judgment had been denied based on erroneous factual assertions made by Paul's counsel. Specifically, Kenroy argued that the representation made by Paul's counsel indicating that Paul had examined the boxes of the other lamps he purchased contradicted

Paul's previous testimony, and was simply untrue. (Motion to Reconsider at 1.) In seeking reconsideration, Kenroy highlighted the manner and time frame in which Paul identified Kenroy as the distributor of the lamp. Paul did not respond to Kenroy's motion for reconsideration.

On March 1, 1999, the trial judge granted Kenroy's motion for reconsideration and granted summary judgment in its favor. The trial judge found in relevant part that:

> In the Order of October 28, 1998, the Court denied Defendant's Motion for Summary Judgment based on Plaintiff's assertion that he had gone back to the store and verified that Defendant manufactured the allegedly defective lights which caused his injury by looking on the boxes of lights which were similar in make and model. **However, Defendant directs the Court's attention to the fact that Plaintiff did not return to the store until a month after the incident occurred. Defendant argues that Plaintiff's assertion cannot be the basis for denying its summary judgment motion in light of the lengthy lapse of time. The Court agrees.**
>
> In addition, Defendant's Motion to Reconsider was filed on November 12, 1998. Plaintiff has not responded.

(Amend. App. at 7 (emphasis added.) Paul now argues on appeal that

> [t]he motion to reconsider, and the resulting vacatur of the October 1998 order, was **based on a single contention: the return trip to the store was made too late to prove that Kenroy distributed the lamp**. Unfortunately, the Territorial Court's order does not contain any discussion of the legal basis for this conclusion. It is not clear whether the order was, in effect, a ruling on causation or a ruling on the relevance of Paul's rebuttal evidence.

(Brief of Appellant at 35.)

Paul is correct. Where a trial court's denial of a motion to

reconsider is based upon the interpretation of legal precepts, our review of that denial is plenary. *North River Insurance Co. v. Cigna Insurance Co.*, 52 F.3d 1194, 1203 (3d Cir. 1995). But, to the extent that the district court's order was based on a factual conclusion, we review under a clearly erroneous standard. (*Id.*) Here, the trial judge came to the clearly erroneous conclusion that the length of time between the accident and Paul's return to the store was the determining factor in finding that Kenroy did not distribute the lamp, leaving no genuine issue of fact which would preclude summary judgment.

This Court is, however, convinced that summary judgment in favor of Kenroy is proper. First, Paul's entire self-serving affidavit filed nineteen months after his deposition should have been stricken, because of the clear conflict with his deposition testimony. To now claim that Paul was confused by the questions during deposition is unconvincing when his counsel accompanied him, objected to questions posed, and attempted to clarify his responses. (See, e.g., Amend. App. at 24, 38, 40.) Granted, a conflicting affidavit may be filed to correct misstatements during deposition, but to do so more than a year and a half after the deposition and on the eve of summary judgment is, we find, a thinly veiled attempt to create "some alleged factual dispute between the parties" to "defeat an otherwise properly supported motion for

summary judgment." *Anderson*, 477 U.S. at 247-48. Second, Paul kept the original boxes in his home until July 1996, but alleges that he went to Electric Avenue in January 1996 to see which companies were listed on a "[s]imilar lamp with a picture on the cover." (Amend. App. at 22.)

Third, in the two years after Paul filed his action for damages, he did not conduct discovery of Kenroy, and failed to produce any evidence that created a genuine issue of material fact to substantiate his claim that Kenroy distributed the lamp in question. Following Kenroy's motion for summary judgment and Wilck's affidavit, the burden shifted to Paul to present evidence through affidavits or depositions and admissions on file which are sufficient to establish the existence of every element essential to his case. *See Celotex*, 477 U.S. at 323. Since Paul's affidavit should not have been accepted, Paul's only other testimony was his deposition where he could not definitively state that Kenroy had distributed the lamp that exploded. Having carefully reviewed this matter, we find that the trial judge was faced with bald assertions, unsupported by evidence, and summary judgment should have been granted in the first instance, on October 28, 1998. Accordingly, we shall affirm summary judgment in favor of Kenroy, but for reasons other than that provided by the trial judge.

III. CONCLUSION

In conclusion, this Court finds that the trial judge abused his discretion and erred in concluding that the "lengthy lapse of time" constituted a sufficient basis upon which to grant summary on reconsideration. We, nonetheless, find that summary judgment was properly granted in favor of Kenroy.

ENTERED this 29 day of August 2001.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

/s/
_____
By: Deputy Clerk